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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-185

LODGE 76, INTERNATIONAL ASSOCIATION OF MACHINISTS, AND AEROSPACE WORKERS, AFL-CIO, and DISTRICT NO. 10, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
Petitioners,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION
and
KEARNEY & TRECKER CORPORATION,
Respondents.

On Writ of Certiorari to the Supreme Court of Wisconsin

REPLY BRIEF FOR PETITIONERS

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ARGUMENT

1. Both respondents urge that *Briggs-Stratton*[1] survives and controls this case, thus posing one important issue before this

[1] *International Union, UAW v. Wisconsin Employment Rels. Bd.*, 336 U.S. 245 (1949).

Court. In their effort to resurrect *Briggs-Stratton*, however, respondents make no attempt to square its reasoning with the reasoning of the Court's opinions in *Insurance Agents*[2] and its progeny,[3] trivialize the holding in *Morton*,[4] and miss the significance of the pertinent legislative history.

The Court in *Insurance Agents* did not say that it was overruling the *Briggs-Stratton* decision. But the fact of the matter is, as respondents' silence on the point apparently concedes, the rationale of *Insurance Agents* amounts to a total rejection of the reasoning in *Briggs-Stratton*.[5] None of the values underlying the premise that the availability of economic pressure devices is part and parcel of the process of collective bargaining to which the statute is committed can be secured unless the admonition against federal administrative regulation of the choice of economic weapons absent a particularized statutory mandate runs against the states as well. The claim that Congress limited the Board's authority over peaceful economic pressures in order to make room for the states to regulate them must be rejected out of hand.

Nor can the holding in *Morton* be trivialized as some narrow exception to state jurisdiction over peaceful collective bargain-

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[2] *Labor Board v. Insurance Agents' International Union*, 361 U.S. 477 (1960). Actually, the major premise in this reasoning originated in *Local 1976, United Bhd. of Carpenters, etc. v. Labor Board*, 357 U.S. 93, 99-100 (1958); "[T]he Taft-Hartley Act was, to a marked degree, the result of conflict and compromise among strong contending forces and deeply held views on the . . . appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests."

[3] *Labor Board v. Drivers Local Union No. 639*, 362 U.S. 274 (1960). *Florida Power & Light Co. v. Int. Bhd. of Electrical Workers*, 417 U.S. 790, 805, n. 5 (1974).

[4] *Local 20, Teamsters Union v. Morton*, 377 U.S. 252 (1964).

[5] Cf. *Scott Hudgens v. Labor Board*, — U.S. —, No. 74-773, *slip op.*, pp. 10-11.

ing weapons applicable only to permissible secondary pressures, either on its own terms or as construed subsequently by this Court. The opinion, for a unanimous Court, declares the broad principle that self-help collective bargaining weapons permitted, though not necessarily protected by § 7 of the federal statute, cannot be outlawed by the states without upsetting the balance of power between labor and management expressed in federal labor policy. Lawful secondary pressures simply illustrate weapons in this category; they scarcely exhaust it.[6] This Court has subsequently invoked the *Morton* principle with respect to state law regulating solely primary conduct[7] as well as to preempt state remedies which interfere with federal labor policy.[8] Moreover, *Morton* amounts to an elaboration of the *Garner* thesis, which addresses primary conduct and was most recently invoked for the proposition that the federal regulatory scheme leaves activities neither protected nor prohibited "to be controlled by the free play of economic forces."[9]

Respondent Kearney & Trecker's treatment of the 1947 legislative history acknowledges that Congress focused upon, and did not enact, a proposal to outlaw "concerted interference with an employer's operations conducted by remaining on the employer's premises" but argues that it would not have applied here because the employees, literally, left the "premises" at the end of each shift rather than work the overtime. However, since they returned to the premises for work the following day, it can scarcely be said with certainty that the proposal would *not* have

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[6] *E.g.*, the Supreme Court of Illinois has recently applied the *Morton* rule to an employer's weapon, i.e. the right to replace strikers. *Illinois v. Federal Tool & Plastics*, — Ill. —, — N.E. 2d —, 90 L.R.R.M. 2536.

[7] *Beasley v. Food Fair of North Carolina*, 416 U.S. 653, 663 (1974).

[8] *Connell Co. v. Plumbers, etc. Local No. 100*, 421 U.S. 616 (1975).

[9] *Labor Board v. Nash-Finch Co.*, 404 U.S. 138, 144 (1971).

reached the conduct in question. More important, the language would clearly have encompassed "partial strike" activities such as slowdowns or intermittent strikes which respondents would have this Court equate with a concerted refusal to work optional overtime. Hence the apparent legislative determination to leave such peaceful concerted bargaining pressures to employer self-help would seemingly apply to the conduct in question here with even greater force.[10]

2. Regrettably, we find it necessary to correct certain factual representations and apparent distortions of the case law found in the opposing briefs. Respondents apparently dispute the optional nature of overtime work at Kearney & Trecker, claiming that the reasons for rejecting it had to be "acceptable to supervision" (Comm. Br., p. 6; cf. K & T Br., p. 2), that this employer had the "right . . . to require overtime under its [expired] contract" (K & T Br., p. 15) and that overtime was "not extra duty [but] simply part of the job" (*Id.*). However, the record evidence is all to the effect that overtime was completely optional (A. 22, 23, 39), that it could be rejected for good reason or no reason at all (A. 23), and that management proposals to change the overtime practice so that it would become "part of the regular work schedule" and mandatory "excepting for reasons acceptable to supervision" were rejected, and the practice of optional overtime maintained during the entire course of this dispute (A. 61-62, 25, 38-39). Thus it simply cannot be said that in collectively exercising their right to reject overtime work these employees were imposing their own conditions of employment on the employer.

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[10] Contrary to the respondent employer's contention (Br., p. 22) it is the reasons given for not outlawing the conduct, rather than the reasons given for not expressly excluding it from § 7, that are material to this issue here. Moreover, since the conduct in question here is concededly not prohibited by § 8(b)(1), we fail to see any significance to the fact that the legislative history indicates that violent or tortious conduct in breach thereof may also be subject to redress under ordinary principles of law.

Kearney & Trecker's effort to show that the unprotected nature of the conduct here has been settled with unclouded legal significance seems seriously flawed. The recitation of the facts in *Decision, Inc.*, 166 NLRB 464, fails to mention that the employees in question, immediately prior to discharge, had been *ordered* to work the overtime and told they would be *fired* if they refused (*id.* at 478-479). Again, in *John S. Swift Co.*, 124 NLRB 394, 397, the Labor Board took pains to point out that the prior practice had been *changed* and the employees discharged for having *defied* what they understood to be an order to work the overtime, under pain of discharge. Far from supporting respondents' theory, these cases in fact demonstrate the critical differences between conduct the Labor Board holds unprotected and concerted activity, as here, that will be ruled within § 7 protection.

3. Respondents' arguments are, at bottom, a rejection of the federal labor policy which contemplates the exercise of peaceful economic pressure to resolve collective bargaining deadlocks. None of them justify the application of state law, serving no interest deeply rooted in local feeling and responsibility, to alter the balance of power struck by Congress with respect to peaceful collective bargaining weapons. Respondent employer concedes the availability of an arsenal of self-help options of its own to counter the peaceful concerted activity of its employees but rejects them as "self-defeating", preferring state injunctive relief as the "only effective remedy available" (K & T Br., p. 24, n. 36; p. 19, n. 28). Self-help was no remedy, K & T concedes, because such steps "would have only increased its already enormous production problems" (*Id.*, at 24). Respondent employer, in other words, lacked sufficient relative bargaining strength to secure acceptance of its demands; that is what its arguments in favor of state jurisdiction come down to. To permit the "balance of bargaining advantage to be set" by state law rather than "economic power realities" is, we respectfully submit, the very

antithesis of the congressional policy manifest in the federal statute[11] and repugnant to Article VI, Cl. 2 of the Constitution of the United States.

CONCLUSION

For the foregoing reasons as well as those set forth in our initial brief, the judgment below should be reversed.

Respectfully submitted

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[11] *Labor Board v. Burns' Security Services*, 406 U.S. 272, 288 (1972).